UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD,

TBC CORPORATION and **TBC RETAIL GROUP, INC.,** a wholly-owned subsidiary of TBC CORPORATION **and** **LUIS RODRIGUEZ**, an Individual	**CASE 12-CA-157478** **12-CA-170543**

BRIEF IN SUPPORT OF RESPONDENTS TBC CORPORATION AND TBC RETAIL GROUP'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

Luis Rodriguez ("Charging Party") filed unfair labor practices against Respondents TBC Corporation and TBC Retail Group (collectively "Respondents") in case numbers 12-CA-157478 and 12-CA-170543, following which Complaints were issued. (ALJD 1). The General Counsel issued the Complaint on Charge No. 12-CA-157478[1] on November 30, 2015, alleging violations of Section 8(a)(1) of the Act based on Respondents' arbitration agreement. (ALJD 1; GCX-1(g)). On May 17, 2016, the General Counsel issued the Complaint on Charge No. 12-CA-170543[2] alleging violations of Section 8(a)(1) of the Act based on Respondents' no solicitation policy, along with an Order Consolidating Cases 12-CA-157478 and 12-CA-170543 for trial, (hereafter, the "Consolidated Complaint"). (ALJD 1; GCX-1(t)).

On October 14, 2016, the Administrative Law Judge ("ALJ") issued a Decision and Order ("Decision") finding in favor of the General Counsel on both claims. There are, thus, two issues before the National Labor Relations Board ("NLRB") in this case: (1) whether Respondents unlawfully maintained an overly broad no solicitation policy, and (2) whether Respondents unlawfully maintained and enforced arbitration agreements containing a class action waiver. For all the reasons set forth below, the ALJ's findings and conclusions of law are contrary to law and Board policy.

Accordingly, the ALJ's Decision and Order should be reversed as to his findings and

[1] Charging Party filed Charge No. 12-CA-157478 with the Board on August 5, 2015, and Charging Party's actual employer TBC Retail Group ("Respondent Retail Group") submitted a Statement of Position in response thereto on September 4, 2015. On November 19, 2015, Charging Party submitted a Corrected Amended Charge to Charge No. 12-CA-157478 which was substantively identical to its initial Charge except that it named Respondent Retail Group as the employer against whom the charge was brought. (GCX-1(d)).

[2] Charging Party filed Charge No. 12-CA-170543 against Respondent Corporation and Respondent Retail Group on since November 1, 2010, and Respondents submitted their position statement in response to Charge No. 12-CA-170543 on April 6, 2016.

conclusions of law that: (1) Respondents did not effectively repudiate its overly broad no solicitation policy in compliance with *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978); (2) Respondents' arbitration agreements were unlawful under the NLRA; (3) that the Board, Charging Party, and Counsel for the General Counsel were not bound to the U.S District Court's decision regarding the enforceability of the arbitration agreement based on various equitable doctrines; and (4) that certain remedies, including an order that respondents cease taking affirmative action to enforce the arbitration agreement, reimbursement of attorney fees for other litigation, and an order that respondents move the United States District Court to vacate their order compelling arbitration, were appropriate in this case.

As a preliminary matter, the ALJ ignored entirely Respondents' argument that he was bound by the Supreme Court's decision in *Rent-A-Center, West, Inc., v. Jackson*, 561 U.S. 63 (2010) to enforce the delegation clause in Respondents' Arbitration Agreement as written, which required that he defer any question regarding validity or enforceability of the arbitration agreement to a court. As the Supreme Court's precedent is also binding upon the Board, this argument should dispose of Charge No. 12-CA-157478 entirely without any need for the Board to reconsider its decisions in *Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72 (2014) or *D.R. Horton*, 357 NLRB No. 184 (2012) or the several related holdings from federal courts.

Further, throughout his Decision, the ALJ refers to Respondents by inaccurate corporate names. The parties stipulated that the Respondents were TBC Corporation and TBC Retail Group, Inc., and the style was amended in the case based on that stipulation. (JX-1 introduction and n. 1). The Board's order should, therefore, amend the ALJ's Decision to reflect the proper parties.

II. STATEMENT OF FACTS

A. Facts Relevant to Respondents' No-Solicitation Policy

Since January 18, 2012, Respondents have maintained Human Resources Policies and Procedures, Policy No. 406 regarding Solicitation and Distribution ("HR Solicitation Policy"). (ALJD at 5:5–20; JX-1 at ¶ 31; JX-17). The HR Solicitation Policy complies fully with the NLRA as construed by the Board, including limiting solicitation and distribution only during work time and in working areas. (ALJD at 5:5–20, 9:27–30; JX-17).

Previously, Respondent's Associate Handbook ("2010 Associate Handbook"), contained a no solicitation provision, which provided that:

> TBC provides a solicitation free work environment in order to prevent workplace distractions or misunderstandings that can result from solicitation. This means that we do not allow Associates or non-employees to solicit in our buildings, on our property or during work hours, unless that solicitation is approved in advance by the respective Senior Executive in conjunction with Human Resources.

(ALJD at 4:33–5:3; JX-1 at ¶ 30; JX-16).[3] However, Respondent effectively repudiated the no solicitation provision in the 2010 Associate Handbook when it published the 2016 Associate Handbook revised April 4, 2016, which contains a no solicitation provision that is facially valid and admittedly lawful under the NLRA. (ALJD at 5:34–36, 10:9–11; JX-1 at ¶ 32; JX-17). On April 5 and 6, 2016, simultaneous with the issuance of the revised handbook, Respondents posted a notice to employees regarding solicitation on the associate information bulletin boards located in each of Respondents' locations stating that they would not promulgate or maintain written work rules prohibiting employees from soliciting in Respondents' buildings, on [their]

[3] Nevertheless, the 2010 Associate Handbook stated numerous times that it was intended only to express examples and excerpts of Respondent's Policies and Guidelines (including the HR Solicitation Policy) and that it was every Associate's responsibility to be familiar with all Respondent's official policies and procedures, a full list of which were available through the Company's intranet and Human Resources office. (JX-16).

property, or during work hours. (ALJD 6:6–15; JX-1 at ¶ 33; JX-19). Beginning April 4, 2016, the 2016 Associate Handbook has been available to all employees through Respondents' intranet and has been provided to all new hires. (ALJD 5:34–38; JX-1 at ¶ 32 and 34). Since April 6, 2016, Respondents' human resources managers have either visually or verbally confirmed with each store manager that the notices distributed by Respondents were posted to the associate information bulletin boards located in each store. (ALJD 6:15–17; JX-1 at ¶ 35). To the extent that Respondents acknowledged that the 2010 Associate Handbook was provided to employees of several, but not all, of Respondents' subsidiaries, it is also stipulated that the Posted Notices were also disseminated to those employees of those same subsidiaries at locations where the 2010 Associate Handbook was distributed. (JX-1 at ¶ 36).

B. Facts Relevant to Respondents' Arbitration Agreement.

1. Respondents' Arbitration Agreement

Since March 2014, Respondents have required all employees to sign their Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions ("Arbitration Agreement" or "Agreement"), in which Respondents and their employees agreed to submit all employment-related disputes to arbitration and prohibits claims brought on a class or collective basis. (ALJD 2:32–34; JX-1 at ¶ 12–14; JX-2 at 1, subsection 1 and 2; JX-3). Specifically, several pertinent provisions of the Arbitration Agreement provide that:

> (1) ***Except (a) as expressly set forth in the section titled "Claims Not Covered by this Agreement",*** and (b) as otherwise required by applicable law, any and all disputes, claims complaints or controversies ("Claims") between you and TBC Corporation and/or any of its parents, subsidiaries, affiliates, agents, officers, directors, employees . . . that in any way arise out of or relate to your employment, the terms and conditions of your employment, your application for employment and/or the termination of your employment***, will be resolved by binding arbitration and NOT by a court or jury.*** As such, the Company and you agree to forever

> waive and relinquish their right to bring claims against the other in a court of law.
>
> (2) ***To the maximum extent permitted by law,*** the parties agree that this Agreement is equally binding on any person who represents or seeks to represent you or the Company in a lawsuit against the other in a court of law**.** That is, the parties agree that no Claims may be initiated or maintained on a class action basis, collective action basis, or representative action basis either in court or arbitration. . . . If, for any reason, this waiver of class actions/collective actions/representative actions is found to be unenforceable or invalid, then any such class, collective or representative action claim must be litigated and decided in a court of competent jurisdiction, and not in arbitration. ***Any issue concerning the enforceability or validity of this waiver must be decided by a court, and not by an arbitrator.***

(ALJD 3:8–10, 3:18–30; JX-2 at 1, subsection 2) (emphasis added). The Arbitration Agreements also explain that "Claims ***Not Covered*** by this Agreement" include "***[c]laims that are expressly precluded from arbitration by a governing federal statute or regulation*** or by a state law ***that is not preempted by the Federal Arbitration Act***." (ALJD 3:12–14, JX-2 at 1) (emphasis added). Thus, Respondents' Arbitration Agreement, and the class action waiver contained therein, is expressly, clearly, and unequivocally limited to the types of legal claims where arbitration and class action waivers are lawful.

In addition, the parties agreed to a severability clause that provides, "if any court of competent jurisdiction finds any part or provision of this Agreement void, voidable, or otherwise unenforceable, ***such a finding will not affect the validity of the remainder of the Agreement and all other parts and provisions will remain in full force and effect.***" (JX-2 at 3) (emphasis added). This clause requires that, regardless of whether the class action waiver is enforceable, the parties are still bound to arbitration.

2. The FLSA Lawsuit

On June 19, 2015, Corey Desimoni and James Reiter (collectively "Plaintiffs"), filed a

lawsuit against Respondent Corporation in the United States District Court for the Middle District of Florida ("District Court," and the "Lawsuit"), alleging overtime violations pursuant to the Fair Labor Standards Act ("FLSA"). (ALJD 4:7–12; JX-2 at ¶ 10, 20; JX-7). Charging Party opted into the lawsuit in June 2015. (ALJD 4:12–13; JX-2 at ¶ 21).

Subsequently, Plaintiffs filed a Motion for Conditional Certification of a collective action under § 216(b) of the FLSA. (ALJD 4:13–15; JX-2 at ¶ 21–22; JX-8; JX-9). On August 20, 2015, Respondent Corporation filed a Motion to Compel Arbitration ("Motion to Compel Arbitration") with the District Court, but in its Motion to Compel Arbitration, Respondent Corporation argued only that the District Court should compel the Charging Party and others who signed Arbitration Agreements to arbitrate their claims, and Respondent Corporation ***did not*** assert in the Motion to Compel Arbitration that the District Court should compel arbitration specifically on an individual, rather than a collective or class basis. (ALJD 4:19–22; JX-10 at 8). Plaintiffs filed their Response in Opposition to the Motion to Compel ("Opposition to Motion to Compel") on September 8, 2015. (ALJD 4:23–24; JX-2 at ¶¶ 23, 25; JX-10; JX-12). Although Plaintiffs and Charging Party are represented by the same counsel, neither argued in opposition to the Motion to Compel Arbitration that the Agreement was unenforceable under the NLRA, or that *D.R. Horton*, 357 NLRB No. 184 (2012) or *Murphy Oil* U.S.A., *Inc.*, 361 NLRB No. 72 (2014) was implicated by the Motion to Compel. (*Compare* GCX-1(a), GCX-1(d), GCX-1(n), GCX-1(q), JX-4, and JX-5 *with* JX-7, JX-9, and JX-12). Rather, Plaintiffs mainly contested whether the Arbitration Agreement was actually signed by named Plaintiff Corey Desimoni and opt-in Plaintiff Charging Party. (JX-12 at 8–9). On July 1, 2016, the District Court granted the Motion to Compel Arbitration, holding that the Arbitration Agreement was enforceable, and Plaintiffs have not appealed that ruling. (ALJD 4:26–29; JX-1 ¶ 27–28; JX-14; JX-15).

III. LEGAL ARGUMENT—RESPONDENTS' NO SOLICITATION POLICY

A. Respondents Repudiated Any Allegedly Unlawful No Solicitation Provision.

There is no dispute that both the HR Solicitation Policy (in effect since January 2012) and the 2016 Associate Handbook no solicitation provision are lawful under Board law. (ALJD 9:24–10:10). *See Our Way, Inc.*, 268 NLRB 394 (1983) (reiterating standard that "rules prohibiting solicitation during working time are presumptively lawful because such rules imply that solicitation is permitted during nonworking time."). Moreover, Respondents have repudiated the allegedly unlawful no solicitation provision in the 2010 Associate Handbook.

As the Board explained in *Passavant Memorial Area Hospital*, an employer can repudiate unlawful conduct under the Act if the repudiation meets the following criteria: (1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other proscribed illegal conduct; (5) adequately published to the employees involved; (6) the repudiation must give assurances to employees that in the future the employer will not interfere with the exercise of their Section 7 rights; and (7) repudiation must occur in advance of the filing of a Complaint. 237 NLRB 138 (1978).

Here, Respondent revised the no solicitation provision in the 2010 Associate Handbook when it issued the 2016 Associate Handbook on April 4, 2016. (JX-1 at ¶ 32). The ALJ correctly found that the repudiation was both timely and unambiguous. (ALJD 10:15–19). Moreover, the repudiation occurred before the Complaint was issued on Charge No. 12-CA-170543, wherein CGC alleged for the first time that Respondent's no solicitation provision in the 2010 Associate Handbook violated Section 8(a)(1) of the Act. (GCX-1(t)). To effectuate the repudiation, Respondents notified all of their employees that the no solicitation provision in the 2010 Associate Handbook had been revised by posting notices ("Posted Notices") on the associate information bulletin boards located in every store. (ALJD 6:6–17; JX-1 at ¶ 33). The Posted

Notices gave assurances to all employees that in the future Respondents would not interfere with the exercise of their Section 7 rights, stating:

> FEDERAL LAW GIVES YOU THE RIGHT TO:
>
> - Form, join, or assist a union;
> - Choose representatives to bargain with us on your behalf;
> - Act together with other employees for your benefit and protection; and
> - Choose not to engage in any of these protected activities.
>
> ***WE WILL NOT do anything that interferes with these rights.*** Specifically:
>
> ***WE WILL NOT promulgate or maintain Written Work rules prohibiting you from:***
>
> 1) ***Soliciting in our buildings, on our property, or during work hours. We will continue to have a work rule that prohibits you from soliciting during an employee's working time or with another employee during that employee's working time. "Working time" does not include such time as breaks, lunch, or rest periods, or before and after work.***
>
> 2) Engaging in any conduct that will negatively impact the Company. We will continue to have a work rule that prohibits you from engaging in activities, investments, or associations that compete with the Company or that exploit your position with the Company for personal gain.
>
> 3) Failing to participate in any company investigation. We will continue to have a work rule that requires you to cooperate in any company investigation of workplace misconduct.
>
> **WE HAVE** rescinded and given no effect to the rules described above. **WE HAVE** posted the revised Written Work Rules in the Associate Handbook. Also, Human Resources Policy 406 contains a more detailed description of the Company's no-solicitation and no-distribution policy, and remains in effect.

(JX-1 at ¶ 33; JX-19) (emphasis added). In addition, beginning on or about April 4, 2016, Respondents provided the 2016 Associate Handbook (which CGC admits is lawful) to and/or made it available to all of their employees. (ALJD 5:34–38, 10:9–10; JX-1 at ¶ 32). Neither the

Consolidated Complaint nor the Joint Motion and Stipulated Record allege or assert any facts indicating that there was any proscribed conduct on the employer's part after publication of the repudiation or that any other proscribed illegal conduct ***relating to the no solicitation provision (or any other handbook provisions) ever occurred***. (*See* JX-1).

The facts in this case are nearly identical to *Atlas Logistics Retail Group Retail Services*, 357 NLRB No. 37 (2011), where the Board found that an employer repudiated its overly-broad work rules using a posted notice nearly identical to what was posted by Respondents,[4] after both a charge and complaint had been brought. In *Atlas Logistics*, both the ALJ and the Board found that the employer timely repudiated its unlawful work rules. *Id.* at n. 1. Moreover, just as with Respondents' no solicitation provision, although the unlawful work rules were maintained for a long time, there was no evidence presented that the rules were ever enforced and the first challenge to their legality was raised by the charge. *Id.*

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[4] In *Atlas Logistics*, the posting notice provided as follows:

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection; and
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly:
WE WILL NOT promulgate or maintain Written Work rules prohibiting you from:

(1) Discussing wages, hours, and working conditions. We will continue to have a work rule that prohibits you from possessing classified Company information without authorization or revealing confidential information about the Company, that does not relate to wages, hours and working conditions, to unauthorized persons, or removal of such information from the workplace.
(2) Enforcing or remaining on plant premises when not scheduled to work or when not on Company related business. We will continue to have a work rule that prohibits you from entering or remaining in the interior of the warehouse or other work areas when not scheduled for work; or
(3) Conducting personal business during breaks or meal times. We will continue to have a work rule that prohibits you from conducting personal business during working time of any employee. "Working time" does not include breaks or meal times.

WE WILL rescind and give no effect to the rules described above, and **WE WILL** post the revised Written Work Rules that do not contain the unlawful rules, and provide the language of the lawful rules.

In this case, the ALJ correctly held that the Posted notices were timely and unambiguous. (ALJD 10:15–19). CGC first brought any question regarding the legality of the 2010 Associate Handbook no solicitation provision to Respondents' attention in Charge No. 170543, which was filed on February 25, 2016. (ALJD 5:32–33). It is undisputed that Respondents sought to repudiate the allegedly unlawful no solicitation provision only 37 days later, by April 6, 2016. (ALJD 6:6–17, 10:15–16). Moreover, the Consolidated Complaint was not brought until over a month after Respondents' repudiation, on May 17, 2016. (GCX-1(t)).

B. The ALJ's Reliance on *Lily Transp. Co.* and *Douglas Division, The Scott & Feltzer Co.* Are Misplaced.

Nevertheless, the ALJ erroneously held that Respondents' repudiation was ineffective under Board law because (1) the notice "did not adequately explain the reasons for replacing the 2010 rule with the 2016 no solicitation policy, including the unfair labor practices being remedied," citing *Lily Transp.Corp.*, 362 NLRB No. 54,[5] (2015); and (2) "Respondents continued engaging in unfair labor practices after the repudiation by maintaining the aforementioned unlawful arbitration and class action wavier," citing *Douglas Division, The Scott & Feltzer Co.*, 228 NLRB 1016 (1977). (ALJD 10:19–24). The ALJ's reliance on both cases is misplaced.

In relying on *Lily Transp.*, the ALJ conflates the requirements for effective repudiation under *Passavant* with the remedy imposed by the Board in *Lily Transp.* after its determination that the employer had failed to repudiate. In fact, in *Lily Transp.*, the employer had simply distributed a revised employee handbook eleven days before trial ***without any*** accompany notice. 324 NLRB No. 54. In that case, Judge Chu found that the employer's purported repudiation 1)

[5] Apparently relying solely on the incorrect citation found in CGC's brief to the ALJ, the ALJ erroneously cited *Lilly Transportation Corp.*, as 362 NLRB No. **64**, slip op. at 1 (2015).

was not timely, 2) did not admit any wrongdoing, 3) never disclaimed the inappropriateness of the [prior work rules'] language, 4) never acknowledged its unlawful conduct, and 5) failed to publish its repudiation of the offending work rules to its employees. *Id.* The Board agreed with the ALJ's decision "for the reasons stated by the judge," and then found that because the unlawful rules had already been removed from the handbook, it was "unnecessary to order rescission of the overly broad rules." *Id.* Instead, the Board modified the NLRB's posting notice "to inform employees of the background circumstances surrounding the distribution of the modified handbook,"[6] no doubt to give context to the posting notice because the unlawful handbook rules had been rescinded, without any notice whatsoever to employees, over a year earlier. The Board's proposed remedy in *Lily Transp.*, does not add any additional requirement under *Passavant* of an "adequate explanation" for the revised rules.[7]

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[6] The Board's revised notice to employees in *Lily Transp.* only added language to the notice that:

> In December 2013, we distributed to you a new employee handbook. That new handbook revised the previous employee handbook to eliminate three rules that were alleged to violate Federal labor law. The National Labor Relations Board has now found that those rules were unlawful.

This is all that the Board required the employer to include in the posting notice. Not only is it a far cry from the ALJ's purported requirement that repudiation notices "adequately explain the reasons for replacing the 2010 rule with the 2016 no solicitation policy, including the unfair labor practices being remedied," but in considering what is a sufficient repudiation notice, the Board should consider that even "Board notices do not contain this kind of specificity." *The Broyhill Co.*, 260 NLRB 1366, 1366 (1982). In fact, Respondents' Posted Notices state that Respondents "have rescinded and given no effect to the rules described above," and "have posted the revised Written Work Rules in the Associate Handbook," which provides just as much context to the Associate Handbook revisions as the Board's notice language posted in *Lily Transp.* (ALJD 6:9–15, JX-1 at ¶ 33; JX-19).

[7] In his post-trial brief, CGC also cites to *Boch Industries*, 362 NLRB No. 83, n. 3 (2015), where the Board agreed with the ALJ's finding that where an employer simply issued a new handbook modifying unlawful provisions after a complaint had been issued "not all the requirements set forth in *Passavant* have been met. While there has been an adequate publication to the effected employees, the dress code provision remains as is in the handbook, and there have been no assurances by the [r]espondent that, in the future, it will not interfere with the employees' Section 7 rights." As with *Lily*, the facts in this case are substantially different than in *Boch* because Respondents posted a notice simultaneously with its distribution of the revised rules (before a complaint was issued) that complied with the *Passavant* requirements. CGC also cites to *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 193 (2007) (Board affirmed ALJ's finding that repudiation occurred even where "the repudiation does not completely accord with the *Passavant* criteria with regard to timeliness and lack of ambiguity"), *Broyhill Co.*¸ 260 NLRB 1366, 1366 (1982) (Board agreed that repudiation occurred where notice was posted immediately after Respondent learned of a supervisor's unlawful conduct, that respondent's notice specifically assures employees that it will not engage in that type of conduct, and that employees who worked under that supervisor's supervision had an adequate

In *Atlas Logistics* it was sufficient for the employer to post a notice simultaneously with its distribution of the revised rules stating that the employer would not maintain the specific written work rules, that it would not give effect to the rules described therein, and that it had revised the written work rules. That is what Respondents did in this case. Respondents' notice was specific as to the allegedly coercive conduct, adequately published to employees, gave assurances to employees that in the future Respondents would not interfere with the exercise of their Section 7 rights, and was, therefore, sufficient under *Passavant* to repudiate the no solicitation provision in the 2010 Associate Handbook.

Likewise, the ALJ's reliance on *Douglas Division, the Scott & Feltzer Co.*, 228 NLRB 1016 (1977) is misplaced because it is readily distinguishable. In *Douglas Division*, the employer attempted to repudiate an unlawful threat to close the plant if the Union won an election by later disavowing its intent to close the plant. Id. But in the very same letter that disavowed the unlawful threat, the respondent made the same veiled threat of plant closure. *Id.* at *7. So, the new unfair labor practice was directly related to the practice the respondent claimed to have repudiated and occurred simultaneously with the repudiation. *Id.*

In this case, Respondent's repudiation concerned an allegedly overly broad solicitation policy; the alleged subsequent unfair labor practice concerned agreements to waive class actions, and hence was entirely unrelated to the repudiated conduct. Thus this case is identical to *Atlas Logistics*, where the Board held that repudiation was effective, despite a subsequent unfair labor practice, because the subsequent practices were entirely unrelated to the work rules that had been repudiated, and "not of a nature that would tend to undermine the assurances that [respondent]

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opportunity to read the notice, and respondent did not otherwise violate the Act), and *Casino San Pablo*, 361 NLRB No. 148, slip op. at 4-5 (2014) ("[r]espondents did not effectively repudiate the unlawful handbook rules simply by issuing a revised handbook subsequently that deleted the rules.") none of which support the Board's position that Respondents' repudiation was ineffective.

gave to employees concerning the work rules." 357 NLRB No. 37 (2011); *see also Aliante Station Casino & Hotel*, 358 NLRB 1556, 1580, 1587–88, 1600, 1619 (2012) (despite finding 82 separate violations of the Act, employer also repudiated several unfair labor practices), *abrogated by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (recess appointment of Board members were not valid). Moreover, the Board is well-aware that the alleged subsequent unfair labor practice, i.e. the class action waivers, pertain to a novel legal argument by the Board that, at the time Respondents repudiated, had been rejected by every Circuit Court of Appeal that considered the issue, and the Board has only recently sought certiorari with the Supreme Court to consider this issue for the first time.

The ALJ's interpretation of the *Passavant* requirements is also contrary to the spirit and intent of *Passavant*, which is to encourage employers to voluntarily remedy unfair labor practices. *The Broyhill Co.*, 260 NLRB 1366, 1366 (1982) (rejecting the dissent's application of the *Passavant* criteria in a "highly technical and mechanical manner" because "[s]uch voluntary action by employers should be encouraged by this Board"). Here, Respondents did just that, using a notice which conformed to the Board's own posting notice and was nearly identical to the notice found by the Board to be an effective repudiation in *Atlas Logistics*. The ALJ's finding that Respondents, nevertheless, violated the Act because they failed to comply with additional, yet unknown, requirements of *Passavant* actually penalizes Respondents' attempt to voluntarily rectify any unfair labor practice. Contrary to the ALJ's decision here that imposes additional requirements on Respondents, the Board has actually indicated that it may not endorse all of the factors set forth in *Passavant*, and it has, on occasion, found that repudiation is effective even where not every factor was met. *Claremont Resort & Spa*, 344 NLRB 832 (2005) (Board did not endorse all of the factors set forth in *Passavant*); *see River's Bend Health and*

Rehabilitation Service, 350 NLRB 184, at *18 (2007) (finding that memoranda were "sufficient to cure the violation of Section 8(a)(5) despite the fact that the repudiation [did] not completely accord with the *Passavant* criteria with regard to timeliness and lack of ambiguity" because it "implicitly" conceded that respondent violated the act and "implicitly" provided assurance that respondent would not engage in that conduct again). *Kawasaki Motors Corp., USA*, 231 NLRB 1152 (1978) (although a supervisor's conduct constituted surveillance or the impression of surveillance, the Board found no violation where respondent posted a notice that "disclaimed the actions of [the supervisor] and assured the employees of their right to join or not to join the Charging Union, or any union, without supervisory interference). Assuming that Respondents did not satisfy each of the *Passavant* requirements (which Respondents assert that they did), given the circumstances, the Board should nevertheless find that Respondents repudiated the unlawful no solicitation language in the 2010 Associate Handbook.

IV. LEGAL ARGUMENT—RESPONDENTS' ARBITRATION AGREEMENT

A. Supreme Court Precedent Requires the Board to Defer to the Delegation Clause in Respondents' Arbitration Agreement And, Therefore, Dismiss this Claim Entirely.

The Board is bound by the Supreme Court's decisions, including its decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). *See Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963) ("It has been the Board's consistent policy" to defer to decisions of the Supreme Court of the United States). In *Rent-A-Center*, the Supreme Court held that under the Federal Arbitration Act ("FAA"), the parties to an arbitration agreement may delegate who has authority to determine the enforceability of the agreement, and the parties' choice must be enforced, unless a party's legal argument specifically challenges the delegation provision. 561 U.S. at 65. Rejecting the plaintiff's claim that a federal court, instead of an arbitrator, must consider his unconscionability defense, the Supreme Court stated "[t]he delegation provision is an agreement

to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,'" including who will determine the enforceability of the arbitration agreement. 561 U.S. at 68–69.

Here, Respondents' Arbitration Agreement unambiguously delegates that "***[a]ny issue concerning the enforceability or validity of this waiver must be decided by a court . . .***" (JX-2 at 1, subsection 2). Thus, the parties contractually agreed that any question regarding the enforceability or validity of the Arbitration Agreement, including the class and collective action waiver contained therein, has been expressly delegated for determination by a "court," not the NLRB or any other administrative agency. *See Shepard v. NLRB*, 459 U.S. 344, 351 (1983) ("The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws."). Moreover, the reference in the Arbitration Agreement to a "court" clearly does not pertain to the NLRB because the Arbitration Agreement distinguishes a "court" from "Proceedings Before the National Labor Relations Board," which is expressly referred to elsewhere in the Agreement. (JX-2 at 1). Accordingly, any question regarding enforceability of the Arbitration Agreement in this case must be decided by a court. This is precisely what the United States District Court for the Middle District of Florida did when it decided the Motion to Compel Arbitration. (JX-1 at ¶¶ 20, 27–28; JX-14; JX-15). Like the plaintiff in *Rent-A-Center*, CGC has not contested the validity of the delegation clause in particular, and in accordance with *Rent-A-Center*, the Board must defer to the parties' agreement to delegate threshold issues, including the validity of the Arbitration Agreement, to the Court. *Id.* at 73–75.

Although this issue is dispositive of any other legal arguments regarding Respondents' arbitration agreement, the ALJ ignored it entirely. However, it is a threshold question that the

Board must consider before addressing any of Respondents' arguments regarding the NLRA, the FAA, or the Board's decisions in *Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72 (2014) and *D.R. Horton*, 357 NLRB No. 184 (2012). Applying the Supreme Court's precedent, the Board must defer to the delegation clause and dismiss the charge relating to the Arbitration Agreement.

B. Respondents' Arbitration Agreement Is Lawful Under the NLRA.

1. The Current Status of the Law Regarding Class Action Waivers.

"[T]he NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." *D.R. Horton*, 737 F.3d 344, 362 (5th Cir. 2013). In this context, it is significant that, in the NLRA, Congress said nothing about class or collective action lawsuits. Moreover, despite the NLRA's enactment in 1935 (and its reenactment in 1947), for more than seventy-five years, the Board has never suggested (prior to its decision in *D.R. Horton*) that the Act created a substantive right to engage in collective actions. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013) ("no court decision prior to the Board's ruling under review today had held that the Section 7 right to engage in 'concerted activities for the purpose of . . . other mutual aid or protection' prohibited class action waivers in arbitration agreements").

However, in *Murphy Oil*, *D.R. Horton*, and other cases following thereafter, the Board contends that an arbitration agreement is unlawful under Section 7 if it contains a class action waiver. The Board's fundamental premise in these cases is that the opportunity to participate in "collective legal action" is a "core substantive right" protected by Section 7. *See Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72, at *1 (2014).

Three federal Circuit Courts of Appeals, and federal district courts too numerous to mention,[8] have overruled Board decisions on this issue, and have held that arbitration agreements

[8] *See Murphy Oil*, 361 NLRB No. 72, at n. 5 (2014) (Miscimarra, dissenting).

that contain class and collective action waivers are enforceable. See *Patterson v. Raymours Furniture Co., Inc.*, No. 15-2820-CV, 2016 WL 4598542, at *2 (2d Cir. 2016); *Cellular Sales of Missouri, LLC, v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Murphy Oil U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 358–59 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013).[9]

Respondents have sought in this brief to articulate all of the arguments enumerated in the above-referenced decisions, including the Board's opinions in *D.R. Horton* and *Murphy Oil* (specifically the dissenting opinion) that support their position that arbitration agreements containing class action waivers are lawful under the Act, and Respondents expressly incorporate those arguments by reference herein.

2. Burden of Proof.

The burden of proof is upon CGC to prove by a preponderance of the evidence that an unfair labor practice has occurred. *Routre Bertrand Dupoint, Inc.*, 271 NLRB, 443 450 (1984). In this case, CGC asserts that Respondents engaged in an unfair labor practice by requiring employees to sign, and then subsequently enforcing, an arbitration agreement containing a class action waiver. When considering whether to enforce an arbitration agreement, however, the burden is on the party opposing arbitration, here CGC and Charging Party, to show that Congress intended to preclude a collective action waiver in an arbitration agreement. *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("[t]he burden is on the party opposing arbitration, [ ] to show that Congress intended to preclude a waiver of judicial remedies for the

[9] Moreover, two Circuit Courts of Appeal have agreed with the Board and held that class action waivers are unlawful under the Act. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Systems, Corp*, 823 F.3d 1147 (7th Cir. 2016).

statutory rights at issue.")

3. Arbitration Agreements with Class Action Waivers Are Lawful.

a. Employees Can Lawfully Waive Their Ability to Participate in Collective Litigation Because it is a Procedural, and Not a Substantive, Right.

It is well-established that arbitration agreements are lawful in the employment context. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Moreover, parties to a lawsuit can waive any procedural right, and the Board has not argued otherwise. *See, e.g., In re Tax Serv. Ass'n of Illinois*, 305 U.S. 160, 164 (1938) ("Since the parties had only a procedural right to have these issues tried in a plenary suit, they were at liberty to waive this right.") (internal citations omitted); *Davis v. United States*, 417 U.S. 333, 349–50 (1974) (argument that procedural rights had not been waived was "frivolous"). Therefore, it is a necessary premise to the Board's position in *D.R. Horton, Murphy Oil*, and their progeny that the right to engage in collective adjudication must be a substantive right under Section 7 of the Act.

(1) Established Law, Including Supreme Court Decisions, Reflect that Any Right to Collective Adjudication is Procedural, Not Substantive, and May Therefore Be Waived.

A collective action is simply a litigation mechanism, and the Board's characterization of the right to participate in collective actions as "substantive" is simply wrong. According to the Supreme Court, collective adjudication is a procedural right, and not a substantive right or remedy. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("The right of a litigant to employ [a class action under] Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *see also Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016) ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law [regulates] . . . . Procedural rules, by contrast, regulate only the manner of determining the [effect of the substantive law].") (emphasis in original) (internal citations omitted); *Amchem*

Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997) (construing Rule 23's class action requirements in accordance with the Rules Enabling Act mandate that the rules of procedure "shall not abridge, enlarge or modify any substantive right.") (citing 28 U.S.C. § 2072(b)).

There is a long history of Supreme Court decisions enforcing arbitration agreements as they were written and agreed to by the parties, including agreements with waivers of the right to engage in collective actions, or otherwise limiting employees' procedural rights. In fact, the Supreme Court and numerous Circuit Courts of Appeals have rejected the argument that federal statutes such as the FLSA and the Age Discrimination in Employment Act ("ADEA"), ***which expressly provide plaintiffs with the right to pursue collective litigation***, somehow created a substantive right to engage in collective litigation that could not be waived under the FAA. Interpreting its own precedent, the Supreme Court recently acknowledged that "in [*Gilmer v. Interstate/Johnson Lane*], we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions. We said that statutory permission did 'not mean that individual attempts at conciliation were intended to be barred.'" *Italian Colors*, 133 S. Ct. 2304, 2311 (2013) (citing *Gilmer*, 500 U.S. 20 (1991)).

Moreover, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the Supreme Court held that a collective bargaining agreement that prohibited employees from filing age discrimination claims in court was lawful. Respondents recognize that in *Murphy Oil U.S.A., Inc.*, the Board contends that the Supreme Court's decision in *Penn Plaza*, has no bearing on its decision because

> [t]o posit that . . . is to say that union representation makes no difference in the work-place – the antithesis of the NLRA. That an employer may collectively bargain a particular grievance-and-arbitration procedure with a union is not to say that it may

> unilaterally impose any dispute-resolution procedure it wishes on unrepresented employees, including a procedure that vitiates Section 7 rights, simply because it takes the form of an agreement.

We cite to *Penn Plaza*, however, for the proposition that the Supreme Court has treated agreements which waive employees' rights under the ADEA, which expressly contains a collective action mechanism per 29 U.S.C. § 216(b) and 29 U.S.C. § 626(b), as procedural and waivable. There is no question that even in a collective bargaining agreement employers and unions cannot bargain about terms that violate specific provisions of the Act. *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 360 (1958) ("[o]f course, an employer or union cannot insist upon a clause which would be illegal under the Act's provisions") (Harlan, J., concurring). For example, "closed shop" and "hot-cargo" clauses violate a specific provision of the Act and are therefore illegal subjects of bargaining that ***may never be*** included in a collective bargaining agreement. *Honolulu Star-Bulletin,* 123 NLRB 395 (1959), *enforcement denied on other grounds*. Thus, by upholding the waiver in *Penn Plaza*, the Court necessarily determined that employees' waiver of the right to engage in ADEA litigation was not an illegal subject of bargaining, and it, thus, did not violate any specific provision of the Act (i.e. it was not protected by any substantive right under the Act). The existence of a collective bargaining agreement in *Penn Plaza*, therefore, does not change the fact that the Supreme Court has held that ADEA claims, which include the ADEA's collective action mechanism, are waivable and that such waivers do not contravene the NLRA.

Numerous Circuit Courts have also unanimously rejected the argument that the FLSA's collective action mechanism[10] created any substantive right to collective litigation, and upheld

[10] The statutory framework of 29 U.S.C. § 216(b), which authorizes opt-in collective actions in FLSA and ADEA cases, also makes it clear that the "right" to engage in collective actions may be waived. As aptly noted by the Eighth Circuit, "[e]ven assuming Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class

the enforceability of arbitration agreements with class action waivers. *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336–37 (11th Cir.), *cert. denied*, 134 S. Ct. 2886 (2014); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296–97 & n.6 (2d Cir. 2013) (determining that the FLSA collective action right is a waivable procedural mechanism); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052–53 (8th Cir. 2013) (determining that the FLSA did not set forth a "contrary congressional command" showing "that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration"); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (no substantive right to collective action under FLSA, despite express statutory term authorizing aggrieved individual to pursue claim on collective basis); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) (determining that a plaintiff failed to point to any "suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a non-waivable right to a class action under that statute"); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319–20 (9th Cir. 1996) (same). *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 388, 329 (2011) (collective adjudication is "an exception to the usual rule that litigation is conduct by and on behalf of the individual named parties only").

Given the Supreme Court and Circuit Court of Appeals' precedent that class and collective actions are merely procedural and that class action waivers in arbitration agreements are lawful even pursuant to federal statutes that expressly create a right to bring lawsuits collectively, it is clear that the right to participate in class actions and collective actions is a procedural right, which may be waived.

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action as well." *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052–53 (8th Cir. 2013) (analyzing FLSA § 16(b)). These same provisions are incorporated in the ADEA pursuant to 29 U.S.C. § 626(b).

(2) The Board's Own Internal Litigation Procedures Contradict its Interpretation That the Act Creates a Substantive Right for Employees to Pursue Collective Adjudication.

The Board's own internal procedures (which the Board has not changed based on its recent reinterpretation of the NLRA) further undermine its interpretation that Section 7 creates a substantive right to engage in collective litigation. Under Board law, when an employer violates the NLRA, an employee (i.e. the charging party) has ***no*** right – procedural or substantive – to pursue litigation, either on an individual or a collective basis. 29 C.F.R. § 102.15; *Murphy Oil*, 361 NLRB No. 72, at*9 ("Under the NLRA's statutory scheme, employees' Section 7 rights are enforced solely by the Board – there is no private right of action under the Act – through the procedures established by Section 10."). To the contrary, for nearly a century, individuals who have grievances under the NLRA have been required, first, to file a charge with the NLRB. 29 U.S.C. § 160(b); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 235 (1967); NLRB Casehandling Manuel, Part 1 § 10010. The Regional Director investigates the merits of those charges, and if the Regional Director finds that a charge is meritorious, the General Counsel (not the Charging Party) has authority to consolidate it with other charges and to pursue a collective remedy on behalf of numerous employees. 29 C.F.R. § 102.33(c); NLRB Casehandling Manual, Part 1 § 10266.5.

Thus, under the Board's own processes in Section 10 of the Act (and under the Board's own Rules and Regulations), an individual has never been given the substantive right to pursue litigation for alleged violations of the NLRA, either on his or her own behalf or on a collective basis. Thus the Board, in reality, asserts in *D.R. Horton*, *Murphy Oil U.S.A., Inc.*, and its progeny that the NLRA creates a ***substantive right*** to do, under other statutes and in other forums, something it doesn't itself allow.

(3) The Authority the Board Relies Upon Does Not Support its Argument that Collective Adjudication is a Substantive Right.

(a) The NLRB's Reliance on Caselaw, Specifically *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) is Misplaced.

At the heart of the arguments in *D.R. Horton* and *Murphy Oil U.S.A., Inc.* is the Board's contention that the Supreme Court's decision in *Eastex Inc v. NLRB* "ma[kes] clear that Section 7 protects employees when they seek to improve working conditions through resort to administrative and judicial forums." *Murphy Oil*, 361 NLRB No. 72, at *1. However, the Board's reliance on *Eastex* is erroneous because (1) *Eastex* itself did not hold that Section 7 provided employees with a right to resort to administrative or judicial forums; (2) interpreting the Board cases cited in *Eastex*, the *Murphy Oil* Board conflates the right to be free from retaliation for engaging in concerted activity with the right to engage in litigation; and (3) in *Eastex* the Supreme Court acknowledged that there should be limitations to when employees' concerted activities are protected under the "mutual aid or protection" clause of Section 7.

In *Eastex*, the Supreme Court construed the "mutual aid or protection" clause of Section 7 and considered whether an employer unlawfully prohibited the union from distributing a four-part newsletter that (1) urged employees to support the union and union solidarity, (2) encouraged employees to write their legislators to oppose a state "right-to-work" statue, and (3) criticized a Presidential veto of an increase in the federal minimum wage. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558–59 (1978). Although the Supreme Court noted that "***it has been held*** that the 'mutual aid or protection' clause protects employees, from retaliation . . . when they seek to improve working conditions through resort to administrative and judicial forums," the *Eastex* case itself had nothing to do with an employee's resort to an administrative or judicial forum, and the clear text of the Supreme Court's opinion states only that "it has been held," not that the Supreme Court itself made that determination in *Eastex*. To the contrary, the Supreme Court

acknowledged its holding was strictly limited to the distribution issue before it. *Id.* at 567–58 ("It is neither necessary nor appropriate, however, for us to attempt to delineate precisely the boundaries of the 'mutual aid or protection' clause. . . .To decide this case, it is enough to determine that the Board erred in holding that distribution . . . of the newsletter is for the purpose of 'mutual aid or protection.'").

Moreover, the Board conflates the cases cited and relied upon in *Eastex*, all of which protected employees ***from retaliation*** because they made a complaint to an administrative agency or provided assistance to the union in civil litigation,[11] with a right to engage in litigation. In the *Eastex* quote relied upon by the Board, however, the Supreme Court made clear that its only concern was about ***retaliation*** against employees who complained about working conditions in either administrative or judicial forums. *Id.* at 565–66 (emphasis added) ("To hold that activity of this nature [i.e. activities that could be characterized as "political"] is entirely unprotected-irrespective of location or the means employed-would leave employees open to retaliation[12] for much legitimate activity that could improve their lot as employees. As this could

[11] *See Walls Mfg. Co.*, 137 NLRB 1317 (1962), enf'd, 321 F.2d 753 (finding that employer retaliated against employee when it discharged her after she wrote a letter to the state health department complaining of alleged unsanitary conditions in the employer's restroom); *Socony Mobil Oil Co.*, 153 NLRB 1244 (1965), *enf'd*, 357 F.2d 662 (2d Cir. 1966) (finding that employer violated Sections 8(a)(1) and (3) by suspending union representative because he filed an accusation with the United States Coast Guard that the employer was engaged in the unsafe operation of one of its vessels); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (stating that "[g]enerally, filing by employees of a labor-related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith," and finding that the employer violated the Act by discharging employees who signed false affidavits in support of the union's labor-related civil action); *Wray Electric Contracting, Inc.*, 210 NLRB 757 (1974) (finding that employer violated Sections 8(a)(1) and (3) of the Act by discharging employee after he filed an OSHA complaint with the Department of Labor); *Alleluia Cushion Co.*, 221 NLRB 999 (1975) (finding that employee was engaged in protected, concerted activity when he filed complaint to state OSHA office and the employer's home office); *King Soopers, Inc.*, 222 NLRB 1011 (1976) (finding that employer unlawfully retaliated under the NLRA against employee who complained to state civil rights commission and EEOC where collective bargaining agreement provided that the employer and the union will fully comply with laws and regulations regarding discrimination); *Triangle Tool & Engineering, Inc.*, 226 NLRB 1354 (1976) (finding that employer violated Section 8(a)(1) and (3) of the act after it discharged employee because he filed a complaint with the Wage and Hour Division of the Department of Labor).

[12] Further, the Board's cases in *Eastex* find that the Act prohibits *retaliation* regardless of whether a non-NLRA legal matter was handled individually, through joinder, or as a class. If the Board's interpretation of *Eastex* is correct, it would mean that employees would also have a right to file all employment-related lawsuits regardless of

'frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,' we do not think that Congress could have intended the protection of § 7 to be as narrow as petitioner insists."). Thus, the cases cited in *Eastex* do not create any substantive Section 7 right to engage in litigation, whether it be on an individual or collective basis. [13]

Finally, the Supreme Court expressly acknowledged that there are limitations to conduct that should be included in Section 7's "mutual aid or protection" clause. [14] *Id.* at 567–58 ("It is true of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point ***the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause.***") (emphasis added). The scenario at issue in this case —a particular litigation mechanism established and defined by statutes different than the Act, to handle claims under different statutes than the Act, in a different forum than the Board — falls precisely under this exception and has become "so attenuated" that it is not protected under

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whether the suit is filed as a class or collective action. The idea that the NLRA gives employees the right to file a lawsuit for all employment-related claims (which are presumably created by other statutes, such as Title VII, the ADEA, and the FLSA, but perhaps the Board intends to further expand that) is untenable since clearly the right to engage in litigation for those employment-related claims is created by those statutes, not the NLRA.

[13] Likewise, the NLRB and other decisions cited by the Board do not address whether employees have a substantive right to pursue a claim or complaint as a "class." *See Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (when considering whether the Norris-LaGuardia Act only prohibited disputes regarding "concerted activities," in dicta, the Eight Circuit commented that "If the [Norris LaGuardia Act] nonetheless was construed to require concerted activity by employees to establish a labor dispute, a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of the employer *is* 'concerted activity' under § 7 of the National Labor Relations Act."); *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (employer did not dispute the ALJ's conclusion that the filing of a judicial petition for injunction against harassment, filed by an employee, joined by a co-employee, and filed against two co-workers, constituted protected, concerted action under the NLRA); *Salt River Valley Water Users' Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953) (employees' circulation of a petition among coworkers, designating him as their agent to seek back wages under the FLSA, was protected concerted activity); *Spandsco Oil*, 42 NLRB 942, 949-950 (1942) (Board held that the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity).

[14] As Member Johnson explained in his dissenting opinion in *Murphy Oil*, "[a] principle aim of the Act is to protect employees against such retaliation, and its prohibition creates no risk of conflict with the FAA or any other Federal Law. . . . Protecting employees from job-related retaliation is the mission of this agency. Determining the terms under which litigation or arbitration is to be conducted is not." *Murphy Oil*, 361 NLRB No. 72 (Johnson, dissenting).

Section 7 of the Act. *See Murphy Oil*, 361 NLRB No. 72 (Miscimarra, dissenting).[15]

(b) The NLRB's Reliance on the Norris-LaGuardia Act is Misplaced.

In *Murphy Oil*, the Board also incorrectly relies on the Norris-LaGuardia Act to support its position. *Murphy Oil U.S.A., Inc.*, 361 NLRB at *1 ("And even before the Act was passed, Congress had declared in the Norris-LaGuardia Act that individual agreements restricting employees' 'concerted activities for the purpose of . . . mutual aid or protection' – expressly included concerted legal activity – violated federal policy and were unenforceable.") (citing 29 U.S.C. §§ 102–104). However, the Norris-LaGuardia Act says no such thing. 29 U.S.C. § 102 pertains entirely to the *purpose* of the Norris-LaGuardia Act, which is to ensure that individual unorganized workers have the right to engage in protected concerted activities, without any explanation as to what that protected activity is. 29 U.S.C. § 103, which pertains to the unenforceability of "yellow dog" contracts, only states that federal courts will not enforce contracts where (1) "[e]ither party to such contract or agreement undertakes or promises ***not to join, become, or remain a member of any labor organization*** or of any employer organization;" or (2) "[e]ither party to such contract or agreement undertakes or ***promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any***

[15] In his dissenting opinion, Member Miscamarra stated :

> As the Supreme Court observed in *Eastex v. NLRB*, Section 7 was designed "to protect concerted activities for the ***somewhat*** broader purpose of 'mutual aid or protection' as well for the narrower purposes of 'self organization' and 'collective bargaining.'" . . . In each of the cited examples of where resort to an agency or court regarding a non-NLRA claim or complaint was protected, the cases focused on protecting employees from *retaliation* for *initiating* or *participating in* the proceeding. None of the cases dealt—even remotely with the internal procedures applicable to the non NLRA claims or complaints associated with the employee activities. ***This is consistent with the Supreme Court's statement . . . that 'mutual aid or protection' expanded Section 7 only 'somewhat' beyond the particular concerted activities enumerated in Section 7—i.e. self-organization, creating and supporting unions, and collective bargaining.***

(emphasis added).

labor organization or of any employer organization." 29 U.S.C. § 103 (a) and (b) (emphasis added). Thus, neither provision pertains to the enforceability of individual agreements to waive class actions.

Moreover, the Board relies heavily on 29 U.S.C. § 104, which, in part, specifies that in cases growing out of labor disputes, Courts may not enjoin any person from "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or any state." *Murphy Oil U.S.A., Inc.* 361 NLRB at * 13 (citing 29 U.S.C. § 104(d)). Even assuming that 29 U.S.C. § 104 is applicable here,[16] the Board entirely ignores that 29 U.S.C. § 104(h), equally enjoins any court from prohibiting "any person or persons . . . from" "[a]greeing with other persons to do ***or not to do*** any of the acts heretofore specified," including not to participate either "singly or in concert" in any federal court action. Thus, Section 104 of the Norris-LaGuardia Act expressly contemplates that employees may enter into agreements not to participate, in court, in concert with others—the precise conduct the Board contends the Norris-LaGuardia protects.

Finally, the NLRB has simply ***interpreted*** the Norris-LaGuardia Act in a similar manner to its recent interpretation of the NLRA. However, the Board's interpretation of the Norris LaGuardia Act is even less persuasive than its analysis of the NLRA because the Board is not entitled to any deference in its interpretation of the Norris-LaGuardia Act. *D.R. Horton, Inc.*, 737 F.3d 344, 362 n. 10 (2013) ("It is undisputed that the [Norris-LaGuardia Act] is outside the Board's interpretive ambit.") (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992)).

[16] Respondents find it hard to surmise that its Motion to Compel Arbitration is a "case involving or growing out of a labor dispute" where the District Court's order on a Motion to Compel Arbitration is construed as a "restraining order or a temporary or permanent injunction," that the District Court has no "jurisdiction" to issue.

b. Section 8(a)(1) of the Act Only Prohibits Individual Employment Agreements That Restrain Employees' Rights to Organize and Bargain Collectively and Does Not Prohibit Individual Agreements that May Extinguish Some Rights Under the Act.

Contrary to the Board's assertions in *Murphy Oil*, 361 NLRB No. 72, at *11 (2014), *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), do not support the Board's finding that class action waivers are unlawful. Respondents adopt and incorporate Member Johnson's thorough explanation of the majority's misinterpretation of these cases as follows:

> In *National Licorice*, the employer entered into contracts with its employees in which the employees agreed that they would not strike, demand a closed shop or signed agreement with any union, and that an employee's discharge could not be submitted to arbitration or mediation. The agreements themselves had been procured in response to the employees' designation of a union as their representative for collective bargaining and were part of an overall scheme to prevent unionization. In these circumstances, the Court held that the agreements unlawfully "imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by [§§] 7 and 8 of the Act" and that the Board therefore could prohibit the employer from enforcing them.
>
> None of the factors on which the Court relied in *National Licorice* are present here. The [Arbitration] Agreement w[as] not procured in response to employees' effort to unionize, and do[es] not even arguably restrain their right to organize and bargain collectively. I respectfully disagree with D.R. Horton's overbroad characterization of the Court's opinion in *National Licorice* as invalidating "agreements that employees will pursue claims against their employer only individually." ***Instead, the Court condemned such agreements only insofar as their purpose or effect was to foreclose any role for a union in the adjustment of the dispute. No evidence or contention of that character is present here.***
>
> *J.I Case* is inapplicable for similar reasons. There, the Court held that an employer could not lawfully refuse to bargain collectively with a union that represented its employees on the basis of individual agreements previously reached with those employees. That holding would be applicable only if the Respondent relied upon the [Arbitration] Agreement as a basis for refusing to bargain over terms and conditions of employment (including a grievance

> arbitration procedure) with a duly certified or lawfully recognized union representing its employees. But again, no such facts are present here. ***Moreover, although D.R. Horton failed to acknowledge it, J.I. Case specifically approved individual agreements that do not have the proscribed effect on collective bargaining. In language that was inexplicably omitted from the D.R. Horton opinion, the Court stated that: "We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective bargaining agreement or does not amount to or result from or is not part of an unfair labor practice."*** But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those employees in the matters covered by the collective agreement.

Murphy Oil, 361 NLRB No. 72 (Johnson, dissenting) (emphasis added). For all of the reasons stated above, these cases are inapplicable and Section 8(a)(1) of the NLRA does not prohibit agreements that waive the opportunity to participate in class or collective actions.

c. The Board Should Consider Employers' Substantial Business Justification for Prohibiting Class Arbitration.

In considering whether an employee would reasonably construe a rule as interfering with the exercise of Section 7 rights (and whether the rule was actually applied in that manner), the Board has adopted a two-part test, considering: (1) whether the employer's conduct reasonably tended to interfere with Section 7 rights, and, if so, (2) whether the employer can establish a legitimate and substantial business justification for its conduct. *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918–19 (3d Cir. 1976) ("In weighing the justifications offered by the employer we must heed the Supreme Court's admonition that '(i)t is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."'") (quoting *NLRB v. Fleetwood Trailer Co*, 389 U.S. 375, 378 (1967) and *NLRB v. Great Dane Trailers*, 388 U.S. 26 33–34 (1967)); see also *Murphy Oil*, 361 NLRB No. 72 (Johnson, dissenting). Therefore, the Board erred by failing entirely to consider in its analysis the numerous substantial business

justifications that exist for class action waivers in arbitration agreements. As articulated by Member Johnson in his dissenting opinion in *Murphy Oil*: "individual arbitration agreements may reduce litigation costs and delays by providing informal, streamlined procedures that can be tailored to the type of dispute they cover," and "while providing an effective method for resolving covered disputes, agreements that provide for individual arbitration also shield defendants from 'the risk of "in terrorem" settlements that class actions entail." 361 NLRB No. 72 (Johnson, dissenting). Moreover, the Supreme Court has previously recognized numerous reasons for employers to include class action waivers in their arbitration agreements. In *AT&T Mobility LLC v. Concepcion* (which was issued prior to the Board's decisions in either *D.R. Horton* or *Murphy Oil*), the Supreme Court explained as follows:

> [T]he "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." [*Stolt-Nielsen*] 559 U.S. at ——, 130 S. Ct. at 1776. This is obvious as a structural matter: ***Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult.*** And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, ***arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.***

563 U.S. 333, 347–48 (2011) (emphasis added). Similarly, the Supreme Court articulated that "[The switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. In support of this rationale, the Supreme Court cited statistics provided by the American Arbitration Association (AAA) in its amicus curiae brief that as of September 2009, the AAA opened 238 class actions, 121 remained active, 162 had been settled, withdrawn, or dismissed, and not a single case had resulted in a final award on the merits; for the inactive cases, the median time from filing until settlement, withdrawal, or

dismissal was 538 days and the mean was nearly two years (630 days). *Id.* at 348–49. The Supreme Court also explained that:

> [C]lass arbitration greatly increases risks to defendants. ***Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected.*** Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. ***But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable.***

Id. at 350 (emphasis added). In addition, the Court explained that "[a]rbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well." *Id.* at 350–51. Thus, there are numerous substantial business justifications for class action waivers in arbitration agreements. These justifications were clearly considered by Respondents when they agreed to the Arbitration Agreement, since the Agreement states "[i]f, for any reason, this waiver of class actions/collective actions/representative actions is found to be unenforceable or invalid, then any such class, collective or representative action claim must be litigated and decided in a court of competent jurisdiction, and not in arbitration." (ALJD 3:8–1-, 3:18–30; JX-2 at 1, subsection 2). Balancing those justifications, the Board should find that class action waivers in arbitration agreements are lawful under the Act.

C. The FAA Requires that the Arbitration Agreement Be Enforced According to its Terms, Regardless Whether the NLRA Prohibits Class Action Waivers.

Even assuming that collective adjudication is a substantive right and the NLRA, therefore, bars waivers of class actions, the FAA requires that an arbitration agreement be enforced according to its terms unless it falls within one of the limited exceptions discussed below. The FAA is "[t]he background law governing" questions relating to the enforcement of

an arbitration provision, ***even when other federal statutes are at issue***, and it "establishes 'a liberal federal policy favoring arbitration agreements.'" *CompuCredit Corp. v. Greenwood,* 132 S. Ct. 665, 668–69 (2012) (emphasis added) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Under the FAA, "courts must rigorously enforce arbitration agreements according to their terms including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 09 (2013) (internal citations omitted). Moreover, the FAA allows parties to bind themselves to arbitration as they wish, and unequivocally obligates both courts and agencies to respect these contracts on their own terms. *Id*. Like the Arbitration Agreement that the CGC seeks to invalidate in this case, the arbitration agreement at issue in *Italian Colors* excluded class actions in litigation and arbitration, and the Supreme Court expressly found that agreement was lawful. *Id.* at 2308; *see also Concepcion*, 563 U.S. at 350.

In *Italian Colors*, the Supreme Court recognized only three exceptions to the FAA's policy of enforcing arbitration contracts as written. First, the Court noted that an arbitration agreement may be invalid when it "prospective[ly] waive[s] . . . a party's right to pursue statutory remedies." 133 S. Ct. at 2310.[17] Second, the Court cited the FAA's so-called "savings clause" which says that all arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 2309 (quoting 9 U.S.C. § 2). Third, the Court acknowledged that the FAA's guarantees can be overridden by a "contrary congressional command," such as when another law "evinc[es] an intention to preclude" the particular kind of arbitration agreement. *Id.* Subject to these three

[17] The Agreement at issue here expressly permits employees to pursue statutory remedies by filing charges with the Board – the only method the NLRA affords for pursuing its remedies. (JX-2 at 1).

exceptions, arbitration agreements "shall be valid . . . and enforceable." 9 U.S.C. § 2. In *D.R. Horton, Murphy Oil,* and their progeny, the Board purportedly claims the protection of two exceptions to the FFA's mandate, specifically that (1) the NLRA is a basis for the revocation of any contract that comes within the FAA's savings clause, and (2) the NLRA amounts to a "contrary congressional command" overriding the FAA. See *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344, 358 (5th Cir. 2013) As explained below, neither of these exceptions are applicable.

1. The FAA's Savings Clause is Inapplicable.

The FAA's savings clause allows courts to refuse to enforce arbitration contracts on those "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, the FAA savings clause "permits agreements to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Concepcion,* 563 U.S. at 339 (internal citations omitted). However, the savings clause does not permit invalidation of arbitration agreements based on defenses that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," *or those that have a disproportionate impact on arbitration agreements. Id.*

The Board claims that all contracts that limit rights allegedly guaranteed by the NLRA are void because they contravene public policy, and so a contract that limits an employee's supposed Section 7 right to be free of class-based arbitration waivers is void on a generally applicable public policy defense. *D.R. Horton*, 357 NLRB No. 184 at *14. As an initial matter, the Board's argument here relies entirely on the success of its first argument that the NLRA creates a substantive right to class-based arbitration. The Board can only be successful on this argument if it can demonstrate that there is a substantive right to engage in collective litigation which, as explained above, it cannot.

Moreover, the Board's argument suffers a second flaw, which is that in *Concepcion,* the

Supreme Court rejected a similar argument regarding the FAA's savings clause. In *Concepcion*, plaintiffs who sought to avoid an arbitration agreement argued that under the California Supreme Court's holding in *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), arbitration contracts with class-action waivers were per se unconscionable, and, because unconscionability was a generally applicable contract defense, they were unenforceable pursuant to the FAA's savings clause. *Concepcion*, 563 U.S. at 340–41.

The Supreme Court rejected plaintiff's claim because "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. Because California's *Discover Bank* doctrine purportedly required arbitration agreements to permit class-wide arbitration, it had an impermissible disproportionate impact on arbitration—in the words of the Court, requiring class-wide arbitration "[stood] as an obstacle to the accomplishment and execution of the full purposes and objections of Congress [in the FAA]." *Id.* at 352. Accordingly, *Discovery Bank*'s prohibition on class action waivers in arbitration agreements was preempted by the FAA.[18] *Id.* at 352. As the Fifth Circuit explained in *D.R. Horton*, this same fatal flaw exists whether the Board argues that claimants must be permitted to proceed on a class-wide basis in arbitration, or must have the option of proceeding on a class-wide basis in court in lieu of individual arbitration. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 358–60 (2013).

Concepcion, therefore, precludes a finding that the FAA's savings clause is inapplicable, and, therefore, the FAA requires that Respondents' Arbitration Agreement be enforced as agreed

[18] CGC contends that because *Discover Bank* was a state-based rule and the NLRA is a federal statute, there can be no preemption in this case. However, similar principles of reconciliation apply between federal statutes. As explained in *Concepcion* above, the Supreme Court has nevertheless indicated that a general ban on class action waivers is contrary to the FAA's policy favoring arbitration. Give the NLRB's stretched interpretation of Section 7, any reconciliation between the two statutes should be resolved in favor of the FAA and the legality and enforceability of class action waivers.

to by the parties.

2. The NLRA Does Not Contain Any "Contrary Congressional Command" Sufficient to Override the FAA.

Nothing in the Act specifically prohibits class action waivers or arbitration agreements, and therefore, the NLRA also does not contain any "contrary congressional command" sufficient to override the FAA. Instead of any express or unambiguous language, the Board relies on language which generally affords a right to engage in concerted activity. As the Fifth Circuit aptly stated:

> There is no argument that the NLRA's text contains explicit language of a congressional intent to override the FAA. Instead, it is the general thrust of the NLRA—how it operates, its goal of equalizing bargaining power—from which the command potentially is found. For example, one of the NLRA's purposes is to "protect[ ] the exercise by workers of full freedom of association ... for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Such general language is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA. See *CompuCredit*, 132 S. Ct. [665,] 670–71 [(2012)]. Even explicit procedures for collective actions will not override the FAA. *See Gilmer*, 500 U.S. at 32, 111 S. Ct. 1647 (ADEA); *Carter*, 362 F.3d at 298 (FLSA). The NLRA does not explicitly provide for such a collective action, much less the procedures such an action would employ. 29 U.S.C. § 157. Thus, there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.

D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360 (5th Cir. 2013) (footnote omitted).

As explained by the Fifth Circuit, the Supreme Court has on numerous occasions rejected the argument that various legislative provisions were a "contrary congressional command" that overrode the FAA, even though the statutes considered in those cases contained much more explicit congressional "commands" than the general provisions of the NLRA. In *CompuCredit*

v. Greenwood, the Supreme Court held that there was no contrary congressional command in the federal Credit Repair Organization Act despite language requiring consumer disclosures to state "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act" and a non-waiver provision stating "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." 132 S. Ct. 665, 668 (2012). In *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, the Supreme Court held that the Securities Act of 1933, which provided in relevant part that any provision binding on any person to waive compliance with any provisions of that subchapter, did not override the FAA. 490 U.S. 477, 482 (1989). Nor did materially identical language in the Securities Exchange Act of 1934. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231–33 (1987).

Similarly, the Sherman Act, which bans "[e]very contract, combination . . . or conspiracy, in restraint of trade" was not a contrary congressional command sufficient to override the FAA. *Italian Colors*, 133 S. Ct. 2304 (2013) (citing 15 U.S.C. § 1). In *Italian Colors*, the Supreme Court specifically considered whether an arbitration agreement's class action waiver was lawful. The Court pointed out that "[t]he Sherman and Clayton acts make no mention of class actions. In fact, [the statutes] were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Id.* at 2309. Of course, the same is true of the NLRA. Interpreting its own precedent, the Supreme Court also acknowledged that "in [*Gilmer v. Interstate/Johnson Lane]*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective

actions."[19] Finally, the *Italian Colors* Court went on to uphold the validity of the class action waiver, stating, "The parties here agreed to arbitrate pursuant to that 'usual rule,' and it would be remarkable for a court to erase that expectation." *Id.*

Like the aforementioned statutes, the NLRA does not contain any contrary congressional command to the FAA and, therefore, consistent with the Supreme Court's recent decisions in *Italian Colors*, *CompuCredit*, and the other cases cited above, the conflict between the FAA and the Board's recent reinterpretation of the NLRA with respect to class action waivers must be resolved in favor of arbitration.

D. Under the First Amendment, Employers have the Right to Enforce Arbitration Agreements Judicially.

Even accepting the Board's position that Section 7 creates a substantive right to engage in collective adjudication, the First Amendment entitles a litigant to seek redress from the courts with virtual impunity. In *BE & K Construction Co. v. NLRB*, the Supreme Court – rebuffing the Board's asserted authority to declare meritorious lawsuits unfair labor practices – concluded that the First Amendment protected all lawsuits except those that were both objectively baseless and subjectively motivated by an unlawful purpose. 536 U.S. 516, 531 (2002). By requiring that a lawsuit be "objectively baseless" to give up First Amendment protection, the Court did not merely shield successful suits, but also those suits that were unsuccessful so long as they were "reasonably based." Id. at 528.

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[19] The ADEA provides plaintiffs with the ability to bring a "collective action." The collective action provision expressly and unambiguously provides a right to engage in collective litigation:

> An action to recover [for violations of the statute] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). A clearer statement of congressional intent to permit an employee to engage in a collective action – in court – would be harder to imagine. Despite this clear pronouncement, the Supreme Court indicated it would have "no qualms" enforcing a class action waiver in an arbitration agreement.

Respondent Corporation's Motion to Compel Arbitration and its argument that the arbitration agreements were enforceable were not "objectively baseless." When Plaintiff's Motion to Compel was filed, federal appellate authority had nearly unanimously rejected the Board's rulings in *D.R. Horton* and *Murphy Oil*.[20] Indeed, at least one court in the Middle District of Florida (where Plaintiffs' Lawsuit was filed) had rejected the Board's *D.R. Horton* analysis. *De Oliveira v. Citicorp N. Am., Inc.,* No. 8:12-cv-251-T-26TGW, 2012 WL 1831230, at *2 (M.D. Fla. 2012). Moreover, in its Motion to Compel Arbitration, Respondent Corporation only requested that the federal court enforce the Arbitration Agreement and, despite the terms of the class action waiver, Respondent Corporation did not expressly request that the Court order individual arbitration.

In *Murphy Oil*, the Board relies on *Bill Johnson's Restaurants v. NLRB* for the proposition that the First Amendment does not protect an employer's right to petition to enforce an arbitration agreement where "a suit . . . has an objective that is illegal under federal law." 461 U.S. 731, 737 n. 5 (1983)). However, no evidence was presented in the Joint Motion and Stipulated Record that Respondent's objective was to engage in illegal activity, and it is improper for the Board to infer such a motive, especially where numerous courts likewise questioned the Board's rationale in *D.R. Horton* and *Murphy Oil* and the Board itself had the

[20] As of August 20, 2015, the date when Respondent Corporation filed its Motion to Compel Arbitration, the Second, Fifth, Eight, and Ninth Circuits had either disapproved of or cast doubt on the Board's *D.R. Horton* analysis. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 1018 (5th Cir. 2013) (rejecting the Board's reasoning and declining to enforce the NLRB's petition for enforcement); *Richards v. Ernst & Young*, 744 F. 3d 1072, 1075 n. 3 (9th Cir. 2013) (expressly reserving the issue but "not[ing] that the two courts of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the [Board's] decision in *D.R. Horton*"); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n. 8 (2d Cir. 2013) ("Like the Eighth Circuit, however, we decline to follow the decision in D.R. Horton."); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013) (describing *D.R. Horton* as carrying "little persuasive authority" in that case, and stating that "nearly all" district courts had rejected D.R. Horton); see also *Murphy Oil U.S.A. Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. October 26, 2015) (reiterating its rejection of the NLRB's D.R. Horton decision); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) (finding an arbitration agreement with a class action waiver was lawful because the FLSA did "not set forth a non-waivable substantive right to a collective action.").

opportunity in *D.R. Horton* to petition for certiorari with the United States Supreme Court, and did not do so.

The Board's contention that an employer's efforts are unlawful under *Bill Johnson's* because it has the illegal objective of seeking to enforce an unlawful contract provision is a circular argument that is logically flawed. In essence, the Board presumes that the employers' conduct will be found to be unlawful, and then imputes to the employer prior knowledge of that outcome to support its contention that the employer's objective must have been illegal. Under the Board's interpretation, every legal argument presented in litigation that questions Board jurisprudence (both settled and unsettled) would have an illegal "objective." Essentially, the Board's holding is intended to chill employers from asserting their legal rights in court, which is precisely what the First Amendment is intended to protect and why the heightened standard in *BE & K Construction* and *Bill Johnson's Restaurants* was established.

E. Section 9(a) of the Act Protects' Employees' Rights to Adjust Grievances Individually.

Under Section 9(a) of the Act, "any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . . ." 29 U.S.C. § 159(a). The rights provided in Section 9(a) are also reinforced by Section 7, which protects each employee's right to "refrain from" exercising the collective rights enumerated therein. 29 U.S.C. § 157. Thus, the right of employees to resolve their disputes individually encompasses agreement as to procedures that will govern the adjustment of grievances (including not to resolve those grievances collectively), and, even assuming that the Act did create a substantive right to class adjudication of non-NLRA disputes, employees have a

right not to have their claims pursued on a class-wide basis. Accordingly, employees can agree to resolve their claims on an "individual," rather than a class-wide basis, which is precisely what Respondents' employees did when they agreed to the class action waiver in the Arbitration Agreement.

F. The Doctrines of Res Judicata, Collateral Estoppel, Laches, and/or Waiver Preclude any Re-Evaluation by the Board of the Federal Court's Determination that the Arbitration Agreement is Valid and Enforceable.

Res judicata, also commonly referred to as "claim preclusion," dictates that a final judgment[21] on the merits will bar future claims by parties or their privies based on the same cause of action. *McDonnell Douglas Corp.*, 270 NLRB 1204, 1207–08 (1984). Similarly, collateral estoppel commonly referred to as "issue preclusion," precludes litigation of an issue based on a different cause of action in a second action, if that issue was litigated in, and necessary to, the decision in the first action. *Id.* As the Supreme Court has explained "[a] fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction … cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Montana v. United States*, 440 U.S. 147, 153–154 (1979) (internal citations omitted); *Sabine Towing & Transportation Co.*, 263 NLRB 114, 120 (1982) (reiterating *Montana v. United States*). Application of these principles is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction, and precluding parties from contesting matters that they have had a full

[21] Respondent appreciates that as of the date of submission of its trial brief, a final decision has not yet been made, but it respectfully reserves the right to supplement the record when a final decision is made. Respondent raises this argument at this stage to preserve its right to appeal this issue. *See Murphy Oil U.S.A., Inc. v. NLRB*, 808 F.3d 1013, 1017–18 (5th Cir. 2015) (finding that respondent waived its collateral estoppel defense by not sufficiently pressing those arguments before the Board).

and fair opportunity to litigate protects their adversaries from the expense and vexation of attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.[22] *Sabine Towing*, 263 NLRB at 120. The standard for establishing the preclusive effect of an earlier holding are:

> First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case…. Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

Beverly Health and Rehab Servs., Inc. v. NLRB, 317 F.3d 316, 322 (D.C. Cir. 2003) (internal citations omitted).

Similarly, the doctrines of laches[23] and waiver[24] are equitable doctrines under which a party loses the right to adjudicate his or her claims by unreasonably sitting on those claims. All four principles – res judicata, collateral estoppel, laches, and waiver – are applicable in this case where a federal District Court has already ruled on the enforceability of the Agreement at issue, and Plaintiffs, Charging Party, and CGC had every opportunity, but choose not to, argue in opposition to the Motion to Compel Arbitration that the Arbitration Agreement was unlawful pursuant to the NLRA long before the District Court issued its Order enforcing Charging Party's Arbitration Agreement.

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[22] The NLRA purportedly strives to achieve similar goals: "The aim of the [NLRA] is to attain simplicity and directness both in the administrative procedure and on judicial review," including "to avoid 'unnecessary duplication of proceedings,' and to adhere to the goal of obtaining a just result with a minimum of technical requirements" to avoid "undesirable circuit shopping and useless proliferation of judicial effort," and "the prompt determination of labor disputes." *Int'l Union, United Auto. Aerospace and Agr. Implement Workers of America AFL-CIO v. Scofield*, 382 U.S. 205, 211–13 (1965).

[23] Black's Law Dictionary defines laches as an "[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought." BLACK'S LAW DICTIONARY 891 (8th ed. 1999).

[24] Waiver is defined as "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." BLACK'S LAW DICTIONARY 1611 (8th ed. 1999).

Charging Party filed his initial Charge on July 25, 2015, nearly a month after he had filed a notice to opt into the Lawsuit. (ALJD 4:12–13; GCX-1(a); JX-1 at ¶ 21). Thereafter, Respondent Corporation filed the Motion to Compel Arbitration approximately a month later, on August 20, 2015. (ALJD 4:19–20; GCX-1(g)). Charging Party's counsel also represents the two named Plaintiffs in the Lawsuit, and although Respondent Corporation briefly addressed the NLRB's holdings in *D.R. Horton* and *Murphy Oil* in its Motion to Compel Arbitration, neither Plaintiffs nor Charging Party ever argued in Opposition to the Motion to Compel that the Arbitration Agreement was unlawful under the NLRA. (ALJD 4:22–23; JX-1 at ¶ 25; JX-10 at 8; JX-12).

Likewise, CGC was aware that Respondent Corporation sought to enforce arbitration well before the District Court rendered its decision on the Motion to Compel Arbitration. In its original Complaint, dated November 30, 2015, the General Counsel asserted that Respondent Corporation filed a Motion to Compel Arbitration in the Lawsuit on August 20, 2015. (GCX-1(g) at ¶ 5(c)). It is clear, therefore, that, at the very latest, CGC knew as of November 30, 2015 (though likely sooner) that a question regarding the enforceability of the Arbitration Agreement was pending before the District Court. Although the District Court did not rule on the Motion to Compel Arbitration until July 1, 2016, for nearly seven months after the CGC knew the Motion to Compel Arbitration was pending, CGC never sought to intervene[25] in the Lawsuit and Charging Party never sought to amend or supplement the Response in Opposition to the Motion to Compel to include arguments that either *D.R. Horton* or *Murphy Oil* were applicable. (ALJD

[25] Rule 24 of the Federal Rules of Civil Procedure provided CGC with ample opportunity to seek to intervene in the Federal Court litigation arguably either as a matter of right or by permission. Fed. R. Civ. P. 24(b) ("On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.").

4:26–29; JX-1 at ¶ 27–28; JX-14; JX-15). *See e.g. Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128–29 (2011) ("arguments thus omitted are normally considered waived"). Moreover, Plaintiffs never objected to the Magistrate Judge's Report and Recommendation on Respondents' Motion to Compel Arbitration. (JX-15 at 1).

Presumably, CGC did not intervene so that it (and Charging Party) could take a second bite at the apple (despite the Agreement's provision that the enforceability of the Agreement must be determine by a court), in their preferred forum and place Respondents in the untenable predicament of potentially having inconsistent orders regarding the enforceability of its Arbitration Agreement and the class action waiver contained therein. Because (1) Charging Party never raised any argument in response to the Motion to Compel Arbitration that the Arbitration Agreement was unenforceable under the NLRA; (2) CGC never sought to intervene in the Lawsuit to assert its alleged interest in enforcing the Act;[26] and (3) the District Court has now issued an Order finding that the Arbitration Agreement is valid and enforceable and has ordered Charging Party to pursue his claims in arbitration, both CGC and Charging Party cannot now assert that the Arbitration Agreement is unlawful under the NLRA and, pursuant to the doctrines of res judicata, collateral estoppel, waiver, and laches, they are bound by the District

[26] Respondents recognize that in the past the Board has, on occasion, concluded that the General Counsel is not precluded from litigating an issue involving the enforcement of federal law that a private party has litigated unsuccessfully when the Government was not a party to the private litigation. However that rule has been rejected by two circuit courts. *NLRB v. Donna-Lee Sportswear*, 836 F.2d 31, 35 (1st Cir. 1987) (finding privity between the NLRB and charging party and applying issue preclusion despite Board's absence as a named party in district court action); *NLRB v. Heyman*, 431 F.2d 796 (9th Cir. 1976) ("[t]he Board's authority, however, does not extend in the first instance to contract litigation, nor does the Board itself have requisite jurisdiction, as would a court of appeals, to waive a judicial doctrine such as res judicata."). In addition, the application of such a rule seems misplaced in a situation such as this, where the specific remedy requested by the CGC is to vacate a federal court order. In essence, the Board would be taking the position that an administrative agency in the executive branch of the federal government may ignore an order of a court of the judicial branch (and still further may enter an order binding on the same court it has previously ignored). The law regarding judicial review has been contrary since 1803. Marbury v. Madison, 5 U.S. 137 (1803).

Court's Order that the Arbitration Agreement was lawful and enforceable.[27]

G. The Remedies Sought in the Complaint Are Inappropriate.

In the Complaint, CGC seeks the following remedies:

> an Order requiring Respondent to: rescind all [Arbitration Agreements]; notify all applicants and current and former employees who signed the Agreement in any form, and/or with respect to whom the Agreement in any form has been maintained at any time since October 1, 2013, that the Agreement has been rescinded; reimburse [Charging Party] and his fellow plaintiffs for reasonable attorneys' fees and litigation expenses that they may have incurred in opposing Respondent's efforts to enforce the Agreement; and post and electronically distribute a notice to all employees and at all locations of Respondent in the United States and its territories where the Agreement has been maintained. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

(GCX-1(t) at ¶ 10).[28] The ALJ ordered many of the remedies requested by the CGC. (ALJD 11:6–13:10). Although Section 10(c) of the Act empowers the Board to remedy unfair labor practices by taking "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act," the remedies ordered in this case are far from the ordinary remedies usually asserted, and for the reasons stated below are, for the most part, inappropriate remedies in this case.

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[27] On a related note, should the ALJ enter any remedial order, such order should be inapplicable to the Lawsuit filed in District Court and to the only other pending class action against Respondent Corporation or Respondent Retail Group (*Gordon, McNeil, Wrighton, Cole, Grisson, and Dewey v. TBC Retail Group, Inc.*, Case No. 2:14-cv-03365-DCN, filed in the United States District Court for the District of South Carolina) because, in both lawsuits, Plaintiffs allege violations of the FLSA, and the Fourth Circuit, Eleventh Circuit, and the Supreme Court have all indicated that class action waivers are lawful under the FLSA and the ADEA. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336–37 (11th Cir.), *cert. denied*, 134 S. Ct. 2886 (2014); *see also Italian Colors*, 133 S. Ct. 2304, 2311 (2013) (Interpreting its precedent in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991) to permit class action waivers under the ADEA).

[28] Although in other cases where *D.R. Horton* and its progeny are considered, the Board has ordered respondents to withdraw a pending motion to compel and/or to move to vacate an order compelling arbitration, CGC has not requested that remedy in this case. Therefore, Respondents do not specifically address the impropriety of such a remedy, but respectfully request the opportunity to respond if CGC proposes such a remedy in his post-trial brief.

1. Respondents Cannot Unilaterally Rescind a Contract.

The ALJ has ordered Respondents to revise or rescind all Arbitration Agreements. (ALJD 11:10–13). However, this order ignores entirely well-establish contract law which prohibits a party from unilaterally modifying or rescinding a contract. *See Binninger v Hutchinson*, 355 So. 2d 863, 865 (Fla. Dist. Ct. App. 1978) ("It is 'hornbook law' requiring no citations of authority, except common sense, that a contract once entered into may not thereafter be unilaterally modified; subsequent modifications require consent and 'a meeting of the minds' of all of the initial parties to the contract whose rights or responsibilities are sought to be affected by the modification.'") (internal citations omitted).[29] There is no question that, for the most part, Respondents' employees who signed the Arbitration Agreement are not parties to this proceeding, and the Board, therefore, has no jurisdiction over them to invoke bilateral modification of the Arbitration Agreements. Thus, the ALJ's order that Respondents must revise or rescind the Arbitration Agreement is contrary to established law and should be revoked.

2. Any Remedial Order Should Be Limited to Non-Supervisory Employees.

Assuming that the Board orders Respondents to rescind the Arbitration Agreements, the Order should be limited to non-supervisory employees. It is well-established under Board law that supervisors are expressly excluded from coverage under the NLRA. 29 U.S.C. §§ 152(3) and (11). Nevertheless, CGC has requested that Respondents be ordered to rescind ***all*** versions of the Arbitration Agreement, which includes agreements that have been signed by supervisors and other management employees. Respondent respectfully requests that any order be limited to agreements signed by "employees, as that term is defined under the Act," and Respondents

[29] Respondents specifically cite to Florida law, since Charging Party and the Plaintiffs lived in, were employed in, and entered into the Arbitration Agreements in the state of Florida and, therefore, Florida law is the applicable law for contract interpretation of the Arbitration Agreements signed by Charging Party and Plaintiffs. However, the cited legal principles are well-established and also applicable to Arbitration Agreements signed by employees elsewhere.

should not be required to rescind all Arbitration Agreements.

3. Neither Charging Party Nor the Plaintiffs In the Federal Court Litigation Should Be Awarded Any Attorneys' Fees or Litigation Expenses for Opposing Respondent's Class Action Waiver.

It is not an appropriate remedy to require Respondents to pay Charging Party or Plaintiffs' attorneys fees' incurred in opposition to Respondent's Motion to Compel Arbitration because the lawsuit was not based on any retaliatory motive and it did not lack any reasonable basis. *See Section IV. D., supra.* In this case there is no evidence that Respondents' Motion was motivated by any hostility based on the exercise of NLRA-protected rights. In addition, Respondents filed a meritorious motion that was granted by the district court so it could hardly be considered to lack any reasonable basis, especially given the overwhelming number of courts that disagreed with the Board's analysis at the time. Moreover, the Board would be ordering an award of attorneys' fees in a legal proceeding to which it was not a party and over which it has no jurisdiction.

Even assuming that an award for attorney fees' incurred in the District Court lawsuit could be considered an appropriate remedy under the NLRA (which Respondents contend it is not), neither Charging Party nor the Plaintiff should be awarded any attorney fees' or litigation expenses for opposing Respondent's Motion to Compel Arbitration. Specifically, there is no evidence that either Charging Party or the Plaintiffs in the Lawsuit incurred any attorneys' fees or litigation expenses for ***opposing the class or collective action waiver*** in the Arbitration Agreement. To the contrary, the main issue raised by Plaintiffs in their Opposition to the Motion to Compel Arbitration was whether arbitration should be compelled at all and specifically, whether they had signed the Arbitration Agreement. (JX-12 at 8–9). Nowhere in the Motion to Compel Arbitration did Respondent Corporation argue that Plaintiffs must arbitrate their claims on an individual basis. (JX-10). Although Respondent Corporation's Motion to Compel briefly

addressed *D.R. Horton* and *Murphy Oil*, it did not ask the Court to order the parties to individual arbitration. (JX-10). Likewise, despite the fact that Plaintiff's counsel, on behalf of Charging Party, had already filed an unfair labor practice on this precise issue, in Opposition to the Motion to Compel Plaintiffs never argued that the Arbitration Agreement was unenforceable under the NLRA or that *D.R. Horton* or *Murphy Oil* was applicable. (GCX-1(a); JX-12). Thus, there is no reason to believe that Charging Party or the Plaintiffs incurred any expense whatsoever for opposing the class or collective action waiver in the Arbitration Agreement, and, as explained in Section IV. D. above, it was perfectly lawful for Respondent Corporation to seek to compel enforcement of its employees' agreements to arbitrate.

V. CONCLUSION

Supreme Court precedent bars consideration of the Arbitration Agreement because the Agreement expressly delegates to courts the authority to determine the enforceability of the Agreement. Alternatively, the Arbitration Agreement must be enforced for the several other reasons explained above. If any aspect of the Agreement is found to be unenforceable, the remainder of the Agreement should be enforced according to its terms.

As explained above, Respondents also effectively rescinded the allegedly unlawful solicitation policy, and the Board does not contend that the current policy is unlawful.

Accordingly, Respondents respectfully submits that the Complaint should be dismissed in its entirety.

This 11th day of November 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlrb.gov and was duly served electronically upon the following named individuals on this 11th day of November 2016:

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